Supreme Court, U.S.
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In the Supreme Court of the United States

DEVON HOWARD TOEPFER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prior to trial, the district court advised petitioner that the jury's special verdict findings would bind the court for sentencing purposes. At sentencing, over petitioner's objection, the district court calculated the guidelines on the basis of acquitted conduct. Thereafter, the court erroneously imposed sentence without considering statutory sentencing factors. Petitioner failed to object to the statutory error. The questions presented are:

1. Did the district court's exclusive reliance on acquitted conduct in imposing a guideline-based sentence violate petitioner's Sixth Amendment jury trial and Fifth Amendment due process rights?

2. Did the court of appeals err in employing – contrary to the majority of the circuits – a plain error sentencing prejudice test under which a defendant, in order to show the harmfulness of the violation of forfeited procedural rights at sentencing, must present evidence that the sentence would have been lower but for the violation?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

Devon Howard Toepfer, Jeffrey Toepfer, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Devon Howard Toepfer respectfully presents this petition for a writ of certiorari.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Eleventh Circuit (App. 1a-13a) is reported at 2008 WL 2673878 (11th Cir. July 9, 2008). The district court's sentencing ruling is set forth in the sentencing transcript (App. 22a-23a).

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2008. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This petition is premised on the Fifth and Sixth Amendments of the United States Constitution and Rule 52(b) of the Federal Rules of Criminal Procedure:

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fed. R. Crim. P. 52(b)

Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT

In *United States v. Watts*, 519 U.S. 148 (1997), the Court held that the Double Jeopardy Clause does not preclude a sentencing court's use of acquitted conduct to determine a defendant's federal sentencing guideline range. And in *Harris v. United States*, 536 U.S. 545 (2002), the Court held that a conviction is not a

prerequisite to application of statutory minimum sentencing provisions. The Court's later decisions, in *United States v. Booker*, 543 U.S. 220 (2005), holding that the Sixth Amendment right to jury trial bars mandatory application of the sentencing guidelines, and in *Gall v. United States*, 128 S.Ct. 586 (2007), holding that a sentencing court has discretion to deviate substantially from the guideline range, even absent jury resolution of disputed facts, *see id.* at 603 (Souter, J., concurring), do not specifically address whether a defendant's jury trial and due process rights create a basis for reliance on an acquittal in the guideline sentencing process.

Because the extent of a defendant's reliance on a jury verdict may vary from case to case, and because petitioner was advised by the trial court that the sentencing decision would rest on the jury's findings as to drug quantity, this case presents an opportunity for the Court to explain whether, and under what circumstances, a defendant may rely on the jury's verdict in sentencing guideline determinations.

Apart from the constitutional error, the court of appeals also held that the sentencing court's failure to consider statutory sentencing factors did not affect petitioner's substantial rights, a holding premised on the application of the court of appeals' plain error prejudice test under which a defendant must present record evidence showing that the district court would have imposed a lower sentence but for the error, so as to satisfy a "reasonable probability" burden. Because this high standard effectively bars relief for plain sentencing errors, conflicts with the law of other

circuits, and presents an intractable conflict, after several years of the Eleventh Circuit's reiteration of its rule, this case offers an opportunity to resolve the substantial rights test for plain sentencing errors.

A. District Court Proceedings.

Petitioner was charged in a multi-count federal indictment that named him in 11 counts, ranging from drug manufacturing and distribution to money laundering to mortgage fraud to obstruction of justice.[1]

At trial, petitioner was found guilty only of the lesser-included offenses of conspiracy to possess and manufacture, and possession and manufacture of, less

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[1] The indictment charged petitioner with conspiracy, from 1994 to 2003, to manufacture and possess with intent to distribute 1000 or more marijuana plants (count 1), in violation of 21 U.S.C. § 846; manufacturing and possessing with intent to distribute more than 1000 marijuana plants from 1998 to 1999 (count 2), in violation of 21 U.S.C. § 841; attempting to distribute more than 100 kilograms of marijuana in August 2000 (count 3), in violation of 21 U.S.C. § 846; possessing with intent to distribute 50 or more marijuana plants in November 2001 (count 4), in violation of 21 U.S.C. § 841; possessing with intent to distribute 50 kilograms of more of marijuana in November 2001 (count 5), in violation of 21 U.S.C. § 841; obstructing justice (count 8), in violation of 18 U.S.C. § 1512; distributing Diazepam (Valium) pills (counts 9 & 10), in violation of 21 U.S.C. § 841; money laundering conspiracy from 1994 to 2003 (count 11), in violation of 18 U.S.C. § 1956; and making material false statements to a lending institution to secure a mortgage in 1996 (count 14) and in 2000 (count 15), in violation of 18 U.S.C. § 1014.

than 1000 marijuana plants (counts 1 & 2) as well distributing four Diazepam pills (Counts 9 & 10). Petitioner was acquitted of all other charges. The jury made a special verdict finding that the amount of marijuana plants involved was less than 1000.

Before swearing in the jury at trial, the district court engaged in a colloquy with petitioner to insure that he understood that in the event of a conviction, the jury's findings as to the number of marijuana plants would trump the court's discretion to decide that sentencing factor. The trial court asked petitioner if he understood that the court "would be bound to any finding the jury makes," and petitioner responded, "Yes, Your Honor." Trial tr. 3 (Dec. 5, 2005). The district court instructed petitioner that the jury's findings as to marijuana plants would give the court "no discretion as to your sentence." *Id.* The trial court then inquired as to, and petitioner confirmed, his choice to go to trial, with awareness of the finality of the jury's determinations as to the number of plants.

At the conclusion of the trial, the jury returned a verdict with a special finding of an amount of marijuana plants less than that stated in the indictment, specifically, less than 1000 plants. The district court noted that the jury verdict in petitioner's case represented a finding of 661 plants. App. 11a.

At sentencing, petitioner argued that the drug guideline calculation should – as the parties and the court had acknowledged prior to and during trial – be

set on the basis of less than 1000 marijuana plants.[2] The district court overruled the objection and sentenced petitioner based on its finding of a greater amount of plants, a total of 3,744 plants, which raised petitioner's guideline range by more than 5 years. The district court then imposed a guideline-range sentence of 140 months without affording consideration to any of the requisite non-guideline sentencing factors under 18 U.S.C. § 3553(a). Petitioner failed to object to this procedural error.

B. Appellate Proceedings.

The court of appeals, while disputing whether the statements made by the district court and the government constituted consent "to be bound at sentencing" by the jury's factual determinations, held that even if petitioner had relied on such representations, they were unenforceable. App. 6a-7a ("[E]ven if there was an agreement between [petitioner] and the government, the agreement would

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[2] At sentencing, the government did not dispute that petitioner chose to go to trial believing that the jury verdict would control the drug quantity calculation for his sentencing guidelines. During the jury instruction conference, the government recognized – consistent with the pretrial advice by the district court – that the jury's findings as to the number of marijuana plants would control the guideline determination and requested that the verdict form include offense level-graded findings *above* the quantity amounts stated in the indictment. Trial tr. 64-65 (requesting that jury verdict form allow for finding as to more than 3,000 plants). The trial court denied the request, and the jury found lesser amounts than those charged.

not preclude the district court from fulfilling its obligation under the Sentencing Guidelines to conduct independent findings of fact necessary for imposing a reasonable sentence."). Regarding the district court's reliance on acquitted conduct in determining the guideline-range sentence, the court of appeals held that the district "court did not violate [petitioner]'s Fifth or Sixth Amendment rights by calculating his sentence based on judge-found facts, including acquitted conduct." App. 7a (citing *United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005)).

Applying plain error review to the district court's "procedural sentencing error under *Booker* [in failing] to consider the 18 U.S.C. § 3553(a) factors in calculating" petitioner's sentence, App. 8a, the court of appeals held that petitioner failed to establish an effect on his substantial rights because he did not present evidence showing "that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence." App. 10a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE WHETHER THE FIFTH AND SIXTH AMENDMENTS LIMIT A DISTRICT COURT'S RELIANCE ON ACQUITTED CONDUCT IN IMPOSING A GUIDELINE SENTENCE.

The Court has not revisited the role of acquitted conduct in the sentencing guideline process since its

pre-*Apprendi*[3] holding, in *United States v. Watts*, 519 U.S. 148 (1997), that double jeopardy does not bar such reliance in the federal guideline system. For numerous reasons, including the public's continuing surprise and misunderstanding as to the lack of effect of jury verdicts[4] and the persisting predominance of the guideline calculation as a sentence-determinative benchmark,[5] the Court should resolve the circumstances under which acquitted conduct may be used to substantially increase punishment under the sentencing guidelines.

In *Watts*, the Court stated that "sentencing enhancements [based on acquitted conduct] do not punish a defendant for crimes of which he was not

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[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[4] *See, e.g.*, Mark Hansen, "Acquitting Time," ABA JOURNAL (Aug. 2008); Scott Michaels, "When Not Guilty Can Mean More Prison Time: Judges Can Sentence Criminals to Longer Prison Terms Even After a Jury Has Acquitted Them," ABC News (Sept. 16, 2008), available at http://abcnews.go.com/TheLaw/Story?id=5809692&page=1.

[5] The Sentencing Commission's most recent national comparison of sentences imposed relative to the guideline range shows that from October 1, 2007 to June 30, 2008, only 13.1% of all sentences were non-government-sponsored below-guidelines sentences, 1.6% were above-guideline sentences, and 85.2% of all sentences were within-guideline or government-sponsored-below-guideline sentences. U.S. Sentencing Commission, Preliminary Quarterly Data Report (3rd Quarter 2008), Table 1, available at: http://www.ussc.gov/sc_cases/USSC _2008_Quarter_Report_3rd.pdf.

convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction." *Watts*, 519 U.S. at 154 (citing *Witte v. United States*, 515 U.S. 389, 402-03 (1995)). But *Watts* addressed only the double jeopardy consequences of an acquittal, not its Sixth Amendment significance or its relevance to other Fifth Amendment rights. *See United States v. Booker*, 543 U.S. 220, 240 & n. 4 (2005) (*Watts* involved the "very narrow question" presented by the Double Jeopardy Clause).

Although to date the conflict over the use of acquitted conduct has been only internal to the circuits, there are numerous published opinions explaining the fundamental constitutional problems with such reliance in the guideline process.[6]

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[6] *See, e.g., United States v. Grier*, 475 F.3d 556, 586 n. 34 (3d Cir. 2007) (Ambro, J., concurring) (even if *Watts* "survives" *Apprendi*, "the practice of considering acquitted conduct might not [and] doing so might still violate the jury right of the Sixth Amendment as expounded by *Apprendi* and its progeny"); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, J., dissenting) (arguing that *Watts* focused solely on the Fifth Amendment and is inapplicable to Sixth Amendment challenges); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) (suggesting that *Watts* has been "explicitly disavowed by the Supreme Court as a matter of Sixth Amendment law [and] has no bearing on this case in light of the Court's more recent and relevant rulings"); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring) ("The oddity of all this is perhaps best highlighted by the fact that courts are still

(continued...)

Most recently, in *United States v. Canania*, 532 F.3d 764 (8th Cir. 2008), Judge Myron Bright set forth his "strongly held view that the consideration of 'acquitted conduct' to enhance a defendant's sentence is unconstitutional." *Id.* at 776 (Bright, J., concurring). And in *United States v. Settles*, 530 F.3d 920, 923-24 (2d Cir. 2008), the District of Columbia Circuit, applying *Booker* and *Watts*, concluded that the Constitution does not prohibit acquitted conduct sentencing, but acknowledged that

> we understand why defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence; and we know that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence.

The District of Columbia Circuit nevertheless rejected a hard-and-fast rule, such as that applied by the court of appeals in petitioner's case, and concluded that "even though district judges are not required to discount acquitted conduct, the *Booker-Rita-*

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[6] (...continued)
using acquitted conduct to increase sentences beyond what the defendant otherwise could have received – notwithstanding that five Justices in the *Booker* constitutional opinion stated that the Constitution requires that facts used to increase a sentence beyond what the defendant otherwise could have received be proved to a jury beyond a reasonable doubt.").

Kimbrough-Gall line of cases may *allow* district judges to discount acquitted conduct in particular cases – that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate." *Id.* at 924 (emphasis added) (citing *Kimbrough v. United States*, 128 S.Ct. 558, 570 (2007)).[7]

That the Circuits are troubled by the acquitted conduct problem is notably seen in the *en banc* proceedings presently being conducted by the Third Circuit which, for nearly a year, has had under consideration the question of whether acquitted conduct may be used to set guideline sentences. *United States v. White*, 503 F.3d 487 (6th Cir. 2007) (rehearing *en banc* granted Nov. 30, 2007).

As Judge Bright's recent opinion explained, the continuing reliance on acquitted conduct in the present guideline system contravenes the thrust of nearly a decade of this Court's decisions:

> In the last decade, the Supreme Court re-affirmed the jury's central role in the criminal justice system. *See, e.g., Apprendi v. New Jersey*,

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[7] *See also United States v. Ibanga*, 454 F.Supp.2d 532, 541 (E.D. Va. 2006) (observing that use of acquitted conduct drives "'a wedge between the community's sense of appropriate punishment and the criminal sanction inflicted'") (quoting Barry L. Johnson, *If at First You Don't Succeed – Abolishing the Use of Acquitted Conduct in Guidelines Sentencing*, 75 N.C. L. Rev. 153, 185 (1997)), *vacated and remanded*, 271 Fed.Appx. 298 (4th Cir. 2008).

> 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005). Rather than pretending as if these cases were never decided, we federal judges should acknowledge their clear implication: A judge violates a defendant's Sixth Amendment rights by making findings of fact that either ignore or countermand those made by the jury and then relies on these factual findings to enhance the defendant's sentence.

Canania, 532 F.3d at 776 (Bright, J., concurring).

Even if the Court's consideration of acquitted conduct at sentencing is sometimes permissible under the Sixth Amendment, there must be constitutional limits to how extensively or exclusively a district court can rely on acquitted conduct to increase a sentence on distinct charges. *See Rita v. United States*, 127 S.Ct. 2456, 2462 (2007) (Scalia, J., concurring) ("[T]he Court's opinion ... does not rule out as applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea.").[8]

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[8] The statutory premise of the court of appeals' holding that sentencing courts *must* use the acquitted conduct in calculating the sentence, based on a preponderance standard, *see* App. 6a-7a, is subject to question. *See* Brief of Amici Curiae Law Professors in *United States v. White*, No. 05-6596, at 5 (Jan. 16, 2008) ("Both the express text and overall structure of 18 U.S.C. § 3553(a) indicate that (continued...)

This case presents the Court with an opportunity to explain the limits of permissible post-*Booker* consideration of acquitted conduct.

Particularly where a jury is given the opportunity to specifically pronounce on the evidence submitted by the government, a number of fundamental constitutional values are weakened by discarding the jury's decision, including the public's perception of, and respect for, the service of jurors. Given the reality of post-*Booker* sentencing, in which sentences are largely within the guidelines range, the discounting of the effect of an acquittal is contrary to the spirit of the Sixth Amendment and here, given petitioner's reliance on the trial court's plea-related advice, violates due process. *See Smith v. Massachusetts*, 543 U.S. 462 (2005) (requiring accused to continue to defend against enhanced charge despite trial court's favorable decision as to the scope of the risk facing the defendant at trial violates due process); *Canania*, 532 F.3d at 777 (Bright, J, concurring) ("[T]he use of 'acquitted conduct'

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[8] (...continued)
Congress intended and expected sentencing judges to be focused principally on offenses of conviction.") (citing *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (suggesting that reference to "the offense" in § 3553(a) concerns "the offense of conviction")); *id.* at 5 n. 2 ("[T]he [Sentencing Reform Act] has no direct references to acquitted conduct. Had Congress intended or sought for acquitted conduct to be a regular and integral component of guideline calculations, it likely would have made clear this view by using phases like 'has committed' and 'responsible for' instead of the chosen phrases of 'been found guilty' and 'convicted of.'").

to enhance a sentence violates the Due Process Clause of the Fifth Amendment. ... [T]he consideration of 'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding.").[9]

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[9] Judge Bright "urge[d] the Supreme Court to re-examine [the] continued use" of acquitted conduct based on both Fifth and Sixth Amendment grounds. *Id.* at 777 ("A defendant should have fair notice to know the precise effect a jury's verdict will have on his punishment. It cannot possibly satisfy due process to permit the nullification of a jury's not guilty verdict, with respect to any given charge, by allowing a judge to thereafter use the same conduct underlying that charge to enhance a defendant's sentence. ... In determining guilt or innocence, the jury thus serves not only as a fact-finder but as a means of providing a defendant with notice as to his possible punishment. And a judge's subsequent use of 'acquitted conduct' all but eviscerates this latter notice function. In short, the unfairness perpetuated by the use of 'acquitted conduct' at sentencing in federal district courts is uniquely malevolent."; "[T]he reality [is that] federal district court judges are often acting as automatons – mechanically enhancing sentences with 'acquitted conduct' pursuant to the now 'advisory' Sentencing Guidelines. And so, in effect, the Guidelines, with respect to 'acquitted conduct,' remain very much mandatory. Neither the Fifth nor Sixth Amendments should tolerate such a practice. But it is not this mechanical adherence to the Guidelines which makes unconstitutional the use of 'acquitted conduct' to enhance a defendant's sentence. That practice is best understood as an artifact of nearly twenty years of mandatory sentencing guidelines. In my view, the Constitution forbids judges – Guidelines or no Guidelines – from using 'acquitted conduct' to enhance a defendant's sentence because it violates his or

(continued...)

In the particular arena of the drug guidelines – which were not set on the basis of empirical study or independent analysis by the Sentencing Commission, but were simply tied to mandatory statutory penalties[10] – the use of acquitted conduct takes sentencing courts farther away not only from traditional constitutional premises of an adversarial justice system, but also from the premise of an ordered determination of advisory guidelines by a specialized body. The consequence is a mechanical application of punishment ranges based on acquitted conduct, as Judge Bright explained in his call for the Court's intervention regarding this issue. *See supra* at 14 n. 8. When the reliance and notice factors present in petitioner's case are added, it is all the more appropriate for the Court address the acquitted conduct punishment issue raised in this case.

II. THE COURT SHOULD RESOLVE THE ENTRENCHED CIRCUIT CONFLICT AS TO APPLICATION OF THE PLAIN ERROR

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[9] (...continued)
her due process right to notice and usurps the jury's Sixth Amendment fact-finding role.").

[10] *See Gall*, 128 S.Ct. at 594 n.2 ("[T]he Sentencing Commission departed from the empirical approach when setting the Guidelines range for drug offenses, and chose instead to key the Guidelines to the statutory mandatory minimum sentences that Congress established for such crimes."); *Kimbrough*, 128 S.Ct. at 575 ("[T]he Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of empirical data and national experience.") (internal quotation and citation omitted).

PREJUDICE TEST TO SENTENCING ERRORS.

In *Gall v. United States*, 128 S.Ct. 586, 597 (2007), the Court characterized the procedural error of failing to consider the statutory sentencing factors and relying solely on the guidelines to determine the sentence – the underlying error in petitioner's case – as a "significant error." *See id.* (holding that appellate courts must "ensure that the district court committed no significant procedural error, such as ... failing to consider the § 3553(a) factors").

This failure to consider the sentencing statute is particularly consequential in the drug guideline context, where the absence of the Sentencing Commission's expertise and empirical analysis renders direct disagreements with the guideline result more tenable even in the mine run of cases. *Kimbrough*, 128 S.Ct. at 575 (discussing policy disagreements with crack guidelines "even in a mine-run case"). Despite the general significance of the error and the heightened importance in the drug context, and despite the added factor in petitioner's case of reliance on acquitted conduct to the surprise of the defendant who chose to forego a plea in light of the district court's assurance of the binding nature of the jury verdict and findings, the court of appeals applied a nearly insurmountable prejudice test that requires the fortuity of record evidence of alternative sentence leanings by the district court before the appellate court's plain error discretion can be exercised. App. 10a.

In the decision below, the Eleventh Circuit applied

the standard it first set forth in *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005), in the context of evaluating "plain (statutory) *Booker* error." In *Rodriguez*, the Eleventh Circuit held that although the district court's application of the guidelines in mandatory fashion satisfied the first two prongs of the "plain error" test, to satisfy the third prong a defendant must prove a "reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge." *Rodriguez*, 398 F.3d at 1301. According to the Eleventh Circuit, if "[t]he record provides no reason to believe any result is more likely than the other," or if

> the effect of an error on the result in the district court is uncertain or indeterminate – where we would have to speculate – the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error; he has not met his burden of showing prejudice; he has not met his burden of showing that his substantial rights have been affected.

Id. (citing *Jones v. United States*, 527 U.S. 373, 394-395 (1999)).

The court of appeals rejected petitioner's plain error claim – that the district court, after substantially enhancing the sentence based on acquitted conduct, failed to consider any non-guideline statutory sentencing factors – on the sole ground that petitioner "points to no evidence in the record showing that if the district court had explicitly considered the § 3553(a)

factors, the court would have imposed a different sentence." App. 10a (holding that "neglecting to consider the § 3553(a) factors" does not affect substantial rights absent record evidence pointing to lower sentence).

Four terms ago, when the Solicitor General responded in opposition to the petition for writ of certiorari in *Rodriguez v. United States*, No. 04-1148, the government acknowledged "a clear and deep multi-circuit conflict on the proper analysis of plain *Booker* error," but asserted that the Eleventh Circuit's then newly-crafted plain error prejudice doctrine, barring plain error relief unless the district court has made a statement indicating a lower sentence would be imposed absent the statutory error, would fade away in that it had a specific limitation relating to the recent *Booker* decision: "[T]he plain-error issue on which the courts of appeals disagree is largely a transitional one, because it involves the standard to be applied by appellate courts in reviewing a limited number of sentences imposed before *Booker*." Brief for the United States, *Rodriguez v. United States*, 2005 WL 1210522, at *18 - *19 (No. 04-1148) (May 2005).

Time has proven the government wrong. Rather than fading, the counterintuitive prejudice test established by the Eleventh Circuit, under which the significance of the sentencing error is rendered irrelevant in the absence of a district court statement suggesting a possible lower sentence, has spread to other types of plain error decisions. *See, e.g.*, *United States v. De La Garza*, 516 F.3d 1266, 1270-71 (11th Cir. 2008) (applying *Rodriguez* to deny relief where

government plainly breached its plea agreement; "It is, at best, uncertain whether the Government's breach had an effect on his sentence, and therefore we hold that De La Garza failed to establish plain error. *See Rodriguez*, 398 F.3d at 1301.").[11]

Thus, the circuit conflict that the government readily conceded in 2005 persists and grows. *See id.* at 11-17 (government brief recognizes conflict between Eleventh Circuit prejudice test, applied by the First, Fourth, Fifth, and Eighth Circuits, and the less stringent test applied by the District of Columbia, Second, Third, Sixth, and Seventh Circuits).

The Eleventh Circuit has not only acknowledged that its approach to "whether *Booker* error is plain error" differed from the approaches of other circuits, but indeed, it squarely rejected the views of the Second, Fourth, and Sixth Circuits. 398 F.3d at 1301-1305. After every circuit eventually weighed in, and after it became apparent that there was a three-way circuit split on the issue,[12] the Solicitor General urged

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[11] The Court has granted certiorari to review whether "a forfeited claim that the government breached a plea agreement is subject to the plain-error standard" under Fed. R. Crim. P. 52(b). *Puckett v. United States*, No. 07-9712, __ U.S. __, 2008 WL 647140 (U.S. Oct. 1, 2008).

[12] The First, Fifth, and Eighth Circuits followed the Eleventh Circuit's approach. *See United States v. Antonakopoulos*, 399 F.3d 68, 80 (1st Cir. 2005); *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 552-553 (8th Cir. 2005) (*en*

(continued...)

this Court to agree to the request for certiorari in *Rodriguez*. *See* Brief for the United States, *Rodriguez v. United States*, 2005 WL 1210522, at *19 (agreeing that "further review is warranted" because "[t]here is a clear and deep multi-circuit conflict on the proper analysis of plain *Booker* error."). While in the Solicitor's estimation, the issue of "plain *Booker* error" would only "affect a limited number of cases" and would "be expected to be of steadily decreasing significance by the time this Court would be likely to decide this case," the Solicitor nonetheless asked for the Court's guidance on the issue, in recognition that

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[12] (...continued)
banc). The Third and Sixth Circuits followed the Fourth Circuit, which closely followed the approach of *Kotteakos v. United States*, 328 U.S. 750 (1946) – answering the "effect on the outcome of the proceeding" question simply by whether the sentence imposed was longer than that which the defendant could have received based solely on the jury's verdict or admitted facts. *See United States v. Hughs*, 401 F.3d 540, 548 (4th Cir. 2005); *United States v. Davis*, 407 F.3d 162, 165 (3d Cir. 2005) (denying petition for rehearing *en banc*); *United States v. Oliver*, 397 F.3d 369, 379-80 (6th Cir. 2005). The Seventh, Ninth, and D.C. Circuits followed the Second, holding that absent evidence of how the district court would have proceeded had it known that the Guidelines were advisory rather than mandatory, the best way to determine prejudice was to effect a "limited remand" to the district court for the district court to specifically answer that question. *See, e.g., United States v. Crosby*, 397 F.3d 103, 120 (2d Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 483 (7th Cir. 2005); *United States v. Ameline*, 409 F.3d 1073, 1078-1080 (9th Cir. 2005) (*en banc*); *United States v. Coles*, 403 F.3d 764, 769-71 (D.C. Cir. 2005).

the circuits' divergent approaches had the potential to affect other cases which did not simply involve *Booker* error:

> [E]leven circuits have adopted three broad approaches, with further variations within each broad category. Some of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review, and they therefore have the potential to affect criminal cases not involving *Booker* error. The conflict in the circuits therefore warrants resolution by this Court.

2005 WL 1210522, at *19. *See also* Petition of the United States for Certiorari in *Barnett v. United States*, No. 04-5252 (maintaining that Sixth Circuit's analysis of the plain error issue was incorrect and that this Court's review was necessary).

Notably, however, once the Court denied review in *Rodriguez* and *Barnett*, the Solicitor reversed position. Despite its recognition of the circuit split's "potential to affect criminal cases not involving *Booker* error," the Solicitor began to urge the Court to decline certiorari in "plain *Booker* error" cases because the issue was merely "transitional" and "of increasingly diminishing importance as the finite set of cases that might be affected by this Court's decision dwindles in number." *See, e.g.*, Brief for the United States, *Mendoza-Torres v. United States*, 2006 WL 849864 (No. 05-7496) (Feb. 28, 2006), at *13. But as the petitioner's case shows, the Solicitor's view of "transitional" error, or "increasingly diminishing importance," was mistaken.

The circuit conflict as to the third prong of the plain error test will never be "transitional," "limited," or of "diminishing importance," for a number of reasons, the first and foremost being that it derives from a fundamental disagreement as to the interpretation of the Court's decisions in *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 (2004), and *Jones*. The Court has not considered application of the *Dominguez-Benitez* test to the sentencing process. However, notwithstanding this Court's holding in *Dominguez-Benitez* that the "reasonable probability" test requires only a probability "sufficient to undermine confidence in the outcome of the proceeding," *id.*, 542 U.S. 83, which "should not be confused with [] a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different," *id.* at 83 n.9, the Eleventh Circuit has read *Jones* in conflict with *Dominguez-Benitez* to require tangible proof by way of evidence surpassing the level of a preponderance, as indeed, they hold that a "reasonable probability" cannot be established where the evidence is in equipoise, *i.e.*, where "[t]he record provides no reason to believe any result is more likely than the other."[13] While other circuits do not impose such a "preponderance" showing, this central question

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[13] While the Government contended in *Rodriguez* that the Eleventh Circuit's analysis was not inconsistent with *Dominguez-Benitez*, 2005 WL 849864, at *10, the government notably did not expressly deny that the Eleventh Circuit adopted a preponderance standard. Indeed, the Eleventh Circuit's holding that an appellant must show more than that the evidence is in equipoise is the very definition of a preponderance standard.

about the meaning of "reasonable probability" is clearly important in all plain-error cases, including plain-error-in-sentencing cases beyond the context of a failure to comply with the post-*Booker* statutory mandate as in petitioner's case.

In light of the Eleventh Circuit's extension of its *Rodriguez* prejudice rule from the "plain *Booker* error" to other sentencing contexts, and given the significance of the procedural error at petitioner's sentencing, this case presents an opportunity for the Court to address this application of *Dominguez-Benitez*, and resolve the meaning of a "reasonable probability" of a different result in sentencing proceedings.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 2008

IN UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-12609

D. C. Docket No. 04-60090 CR-MGC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DEVON HOWARD TOEPFER,
Defendant-Appellant.

No. 06-12718

D. C. Docket No. 04-60090 CR-MGC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JEFFREY ERIC TOEPFER,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 9, 2008)

Before WILSON, COX and BOWMAN* Circuit Judges.

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* Honorable Pasco Bowman, II, United States Circuit Judge for the Eighth Circuit, sitting by designation.

PER CURIAM:

In this consolidated appeal, Devon Howard Toepfer challenges several of the district court's evidentiary rulings as well as the 140-month sentence the court imposed after a jury found him guilty of conspiring to manufacture and possess with intent to distribute marijuana, 21 U.S.C. §§ 841 and 846; manufacturing and possessing marijuana with intent to distribute, id. § 841; and distributing diazepam, id. Jeffrey Eric Toepfer appeals the 123-month sentence the district court imposed after he pleaded guilty to conspiring to manufacture and possess with intent to distribute marijuana, 21 U.S.C. §§ 841 and 846; manufacturing and possessing marijuana with intent to distribute, id. § 841; and conspiring to launder money, 18 U.S.C. § 1956.

I. Devon. We review a district court's evidentiary rulings for abuse of discretion, United States v. Miles, 290 F.3d 1341, 1351 (11th Cir.) (per curiam), cert. denied, 537 U.S. 1089 (2002), and we review questions of constitutional law de novo, United States v. Brown, 364 F.3d 1266, 1268 (11th Cir.), cert. denied, 543 U.S. 879 (2004). Devon first argues that the court's refusal to suppress recordings of his conversations with confidential informant Mark Hastings and unindicted co-conspirator Dan Boller amounted to a violation of his Sixth Amendment right to confrontation and the Supreme Court's holding in Crawford v. Washington, 541 U.S. 36, 68 (2004). In Crawford, the Court held that the Sixth Amendment operates to exclude only "testimonial" hearsay of a declarant who is unavailable at trial and who the

defendant had no prior opportunity to cross-examine. Id. at 68. Moreover, the Sixth Amendment right to confrontation "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 60 n. 9; see United States v. Byrom, 910 F.2d 725, 737 (11th Cir.1990) (noting that a confidential informant's statements in a taped conversation with defendant are admissible to provide context, so long as the informant's statements are not admitted for the truth asserted). Here, the recorded statements of Hastings and Boller were not used to prove the truth of the matters asserted in those statements. Rather, the statements were offered merely to provide context to Devon's admissions about his activities, knowledge, and intent, and thus did not run afoul of the Confrontation Clause. See, e.g., United States v. Hendricks, 395 F.3d 173, 183-84 (3d Cir.2005). Accordingly, the District Court's admission of the recordings did not violate Devon's Sixth Amendment right to confrontation or the Supreme Court's holding in Crawford because the statements were not offered for the truth of the matters asserted therein.

Devon also argues that the court's refusal to suppress the Hastings and Boller recordings violated his Sixth Amendment right to counsel because at the time of the recordings, he was represented in a state matter. Devon's argument is unavailing. The Sixth Amendment right to counsel is offense-specific and does not attach to uncharged crimes-even if those crimes are factually related to the crime for which formal proceedings have been initiated. Texas v. Cobb, 532 U.S. 162, 173 (2001). Devon was arrested

November 8, 2001, on state misdemeanor charges for possession of drug paraphernalia. When prosecution on those charges commenced, his Sixth Amendment right to counsel attached with respect to those charges. See McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) (noting that right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings" (citations omitted)). When the state charges were dismissed on October 24, 2002, however, Devon's Sixth Amendment right to counsel on those charges was extinguished. See United States v. Alvarado, 440 F.3d 191, 196 (4th Cir.), cert. denied, 127 S.Ct. 81 (2006). The recorded conversations with Hastings occurred on June 22, 2000, before Devon was represented by counsel on the state charges. The recorded conversations with Boller occurred on February 13 and 25, 2003, after the state charges had been dismissed and Devon's Sixth Amendment right to counsel on those charges had been extinguished. Accordingly, Devon's Sixth Amendment right to counsel with respect to the state charges does not provide a basis for excluding the Hastings and Boller recordings from his trial on federal charges.

Devon also contends that admission of the recordings violated his Fifth Amendment right to counsel. The Fifth Amendment right to counsel may be invoked only during custodial interrogation or when such interrogation is imminent but, unlike the Sixth Amendment right to counsel, it is not offense-specific. United States v. Grimes, 142 F.3d 1342, 1348 (11th Cir.1998), cert. denied, 525 U.S. 1088 (1999). Because Devon's recorded statements to Hastings and Boller were not the product of custodial interrogation, the Fifth Amendment right to counsel does not provide a

basis for exclusion of this evidence.

To the extent Devon argues that the government engaged in outrageous misconduct amounting to a due process violation and requiring exclusion of the recordings, he has failed to provide any evidence to support those allegations. See United States v. Russell, 411 U.S. 423, 432 (1973) (requiring proof that government conduct was a violation of "fundamental fairness or shocking to the universal sense of justice" (citations omitted)).

Devon next argues that the district court erred in refusing to suppress the evidence seized from his van and his condominium after his November 2001, arrest on state charges. With respect to the drug paraphernalia seized from Devon's van, because Devon failed to provide any substantive argument on the merits of this issue in his briefing to this Court, electing instead to rely on the suppression motions he filed in the district court, we consider this argument waived. See Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1573 n. 6 (11th Cir.1989) (deeming issue waived where party failed to include substantive argument and made only passing reference to the order appealed from). And even if Devon had not waived this argument on appeal, there was probable cause to stop the van and arrest Devon after officers observed the van's driver commit a traffic infraction, see United States v. Holloman, 113 F.3d 192, 194 (11th Cir.1997) (per curiam) (noting that an otherwise valid traffic stop is not made illegal when used as subterfuge to advance drug interdiction efforts), and saw the drug paraphernalia in plain sight through the van's

windows, see Horton v. California, 496 U.S. 128, 130 (1990) (holding that officers may seize evidence in plain view without a warrant).

After Devon was arrested and the paraphernalia was seized from his van, officers sought a search warrant for Devon's condominium. The officers prepared a search warrant affidavit describing their extensive experience investigating marijuana grow houses, the circumstances of Devon's arrest, the drug paraphernalia recovered from the van, and the fact that a certified narcotics-detection dog had alerted to the odor of drugs at the front door of Devon's condominium unit. The affidavit was sufficient to establish the probable cause necessary to support the issuance of a search warrant for Devon's condominium. See, e.g., United States v. Banks, 3 F .3d 399, 402 (11th Cir.1993) (per curiam) (holding that probable cause is established when drug-trained canine alerts to drugs), cert. denied, 510 U.S. 1129 (1994). In short, the district court did not abuse its discretion by admitting the evidence obtained from the search of Devon's van and condominium.

Devon argues that for purposes of calculating his sentencing range under the advisory guidelines, the district court was obligated to use the number of marijuana plants found by the jury in its special verdict. After carefully reviewing the record, particularly those pages of the transcript identified in Devon's brief, we find no support for Devon's assertion that the government and the district court consented to be bound at sentencing by the jury's determination of drug quantity in Devon's trial. Moreover, even if

there was an agreement between Devon and the government, the agreement would not preclude the district court from fulfilling its obligation under the Sentencing Guidelines to conduct independent findings of fact necessary for imposing a reasonable sentence. Cf. United States v. Forbes, 888 F.2d 752, 754 (11th Cir.1989) (holding that sentencing court is not bound by stipulations of fact in plea agreement).

Devon contends that the district court violated his constitutional rights by imposing a sentence based on acquitted conduct, on criminal acts committed outside the relevant statute of limitations, and on a drug quantity greater than that found by the jury. We disagree. Because the district court applied the guidelines in an advisory manner as required under Booker v. United States, 543 U.S. 220, 264 (2005), and Devon's sentence did not exceed the statutory maximum allowed by the jury verdict, see Rita v. United States, 127 S.Ct. 2456, 2465-66 (2007), the court did not violate Devon's Fifth or Sixth Amendment rights by calculating his sentence based on judge-found facts, including acquitted conduct, see United States v. Duncan, 400 F.3d 1297, 1304-05 (11th Cir.), cert. denied, 546 U.S. 940 (2005), criminal acts outside the statute of limitations period, United States v. Behr, 93 F.3d 764, 765-66 (11th Cir.1996), and a drug quantity greater than that found by the jury, United States v. Chau, 426 F.3d 1318, 1323-24 (11th Cir.2005) (per curiam).

Nor did the court err by enhancing Devon's sentence based on his leadership role in the conspiracy because the government proved by a preponderance

that Devon exercised some degree of control, influence, or leadership over the organization. See United States v. Yates, 990 F.2d 1179, 1182 (11th Cir.1993) (per curiam).

We are unpersuaded by Devon's argument that the district court erred by failing to make particularized findings concerning the drug quantity for which he was responsible. A "defendant is accountable for all quantities of [drugs] with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of [drugs] that were within the scope of the criminal activity that he jointly undertook." U.S.S.G. § 1B1.3 cmt. n. 2. The district court generally must make individualized findings concerning the scope of criminal activity undertaken by a defendant before determining the drug quantities reasonably foreseeable in connection with that level of activity. United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993). "If the court does not make individualized findings, the sentence may nevertheless be upheld if the record supports the amount of drugs attributed to a defendant." Id. Based on our review of the record, including the trial and sentencing transcripts and the PSI, we conclude that the district court had ample evidence to support its findings that Devon was directly involved with and responsible for the 3,744 marijuana plants found by the district court.

Devon argues for the first time on appeal that the district court committed procedural sentencing error under Booker because the court failed to consider the 18 U.S.C. § 3553(a) factors in calculating his

sentence. We have held that "it is the defendant's burden, in the district court, to object to procedural irregularities based on Booker. Absent an objection, we will review such claims for only plain error." United States v. Ochoa-Garcia, No. 07-11740, 2007 WL 3120315, at *5 (11th Cir. Oct. 26, 2007) (unpublished per curiam) (adopting the reasoning in United States v. Lopez-Flores, 444 F.3d 1218, 1221 (10th Cir.2006), cert. denied, 127 S.Ct. 3043 (2007)); United States v. Villafuerte, 502 F.3d 204, 208 (2d Cir.2007) (conducting plain-error review of an unpreserved claim that the method used to calculate a defendant's sentence was unreasonable); United States v. Garcia, 233 F. App'x 311, 312 (4th Cir.2007) (unpublished per curiam) (same), cert. denied, 128 S.Ct. 1108 (2008); United States v. Knows His Gun, 438 F.3d 913, 918 (9th Cir.) (same), cert. denied, 547 U.S. 1214 (2006).

Under plain-error review, the defendant must establish that the district court committed an error, that the error was plain, and that the error affected his substantial rights. United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir.), cert. denied, 545 U.S. 1127 (2005). If the defendant can establish these facts, we may exercise our discretion to notice the forfeited error, but will do so only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Id.

Even if we assume that the district court committed plain error by neglecting to consider the § 3553(a) factors at Devon's sentencing, Devon cannot show that the error affected his substantial rights. For an error to affect substantial rights, it "must have been

prejudicial: It must have affected the outcome of the district court proceedings." United States v. Olano, 507 U . S. 725, 734 (1993). Devon points to no evidence in the record showing that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence. Because Devon cannot show that the error affected his substantial rights, his argument asserting procedural sentencing error must fail.

Finally, we decline to consider Devon's claims of ineffective assistance of counsel as those claims are more appropriately raised in a collateral proceeding. See United States v. Bender, 290 F.3d 1279, 1284 (11th Cir.), cert. denied, 537 U.S. 1037 (2002).

II. Jeffrey. At his change of plea hearing, Jeffrey admitted to the offenses outlined in the superseding indictment but declined to admit to the number of marijuana plants for which he was responsible, insisting that there were not more than 1,000 plants and that the district court must sentence him based on the number of plants found by the jury in Devon's trial.

With the government's drug-quantity witnesses present and prepared to testify, Jeffrey's attorney stated at the sentencing hearing, "Based on the PSI in this case ..., we understand that there would be certain testimony from witnesses and we are willing to ... permit the Court to rule on ... what is listed in the PSI as to both the amount of plants, the leadership role and the other enhancements." Tr. of Sent. at 2-3. In response, the government did not call its drug-quantity

witnesses, abandoned its arguments for a three-level enhancement under U.S.S.G. § 2J1.7, and conceded to a three-level departure for acceptance of responsibility. The district court then found that the drug quantity was "correctly computed at ... 5,350 plants. I recognize that the defense maintains that the Court should accept the jury verdict in [Devon's] case of 661 plants, but I do not." Id. at 8.

Because Jeffrey invited the district court to rule on drug quantity based on the 5,350 plants described in the PSI, electing not to put the government to its burden of proof at the sentencing hearing, Jeffrey cannot now complain that the government failed to present evidence regarding the number of plants for which he was responsible. See United States v. Stone, 139 F.3d 822, 838 (11th Cir.1998) (per curiam) (noting that appellate court generally will not review an error invited by a defendant).

To the extent that Jeffrey raises the same arguments raised by Devon regarding the district court's obligation to use the jury's drug-quantity finding to impose Jeffrey's sentence, the court's consideration at sentencing of acquitted conduct and criminal acts outside the statute of limitations, and the court's failure to make particularized findings regarding the extent of Jeffrey's involvement in the conspiracy, we reject those arguments for the reasons already explained.

The district court did not err by enhancing Jeffrey's sentence based on his leadership role in the conspiracy. Based on the facts in the PSI, the district

court was presented with ample evidence to conclude that Jeffrey exercised some degree of control, influence, or leadership over the organization. See Yates, 990 F.2d at 1182.

Finally, we reject Jeffrey's argument that because the district court failed to adequately consider the § 3553(a) factors, his sentence is unreasonable. Assuming that Jeffrey preserved this argument for appeal, we conclude that the district court adequately considered the § 3553(a) factors and imposed a reasonable sentence.

At his sentencing hearing, Jeffrey argued for a sentence at the low end of the advisory guidelines range based on his history and characteristics. The government countered that the sentence should be on the high end of the guidelines range based on Jeffrey's criminal conduct while on supervisory release and his lack of rehabilitation. After "consider[ing] the statements of all the parties," the court imposed a sentence of 123 months' imprisonment, a sentence within the advisory guidelines range. Tr. of Sent. at 14. "[A]n acknowledgment by the district court that it has considered the defendant's arguments and the factors in [§] 3553(a) is sufficient under Booker." United States v. Talley, 431 F.3d 784, 786 (11th Cir.2005) (per curiam); see also Rita, 127 S.Ct. at 2468 (holding that a district court's brief statement of reasons for a within-guidelines sentence was sufficient). Contrary to Jeffrey's contentions, the record reflects that the parties presented evidence and argument addressing the § 3553(a) factors, which the district court adequately acknowledged and considered in imposing

Jeffrey's sentence.

For the reasons stated above, we AFFIRM the conviction and sentence of Devon Howard Toepfer and the conviction and sentence of Jeffrey Eric Toepfer.

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

Case Number: 04-60090-Cr-COOKE

UNITED STATES OF AMERICA
v.
DEVON TOEPFER

JUDGMENT IN A CRIMINAL CASE

USM Number: 70721-004
Counsel For Defendant: Fred Haddad, Esq.
Counsel For The United States: Donald Chase
Court Reporter: Robin Dispenzieri

The defendant was found guilty of Counts one, two, nine, and ten of the Indictment. The defendant is adjudicated guilty of the following offenses:

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
Title 21, U.S.C. §§841(a)(1), 841(b)(1)(A) & 846	Conspiracy to manufacture/ possess with intent to distribute marijuana.	July 16, 2003	1
Title 21, U.S.C. §§841(a)(1), 841(b)(1)(A) & 18 U.S.C. § 2	Manufacture/ possess with intent to distribute marijuana.	April 14, 1999	2

TITLE/ SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
Title 21, U.S.C §§ 841(a)(1) & 841(b)(2)	Distribution of diazepam.	February 19, 2003	9
Title 21, U.S.C. §§ 841(a)(1) & 841(b)(2)	Distribution of diazepam.	February 25, 2003	10

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on counts 3, 4, 5, 8, 11, 14 and 15.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
4/19/2006

/s/ Marcia G. Cooke
Marcia G. Cooke
United States District Judge

April 24, 2006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **140 Months as to counts 1 and 2, and 36 months as to counts 9 and 10. All counts concurrent.**

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with

a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **4 years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

The defendant shall participate in an approved treatment program for mental health/substance abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

The defendant shall not apply for, solicit, or incur any further debt, included but not limited to loans or lines of credit, either as a principal, co-signer or guarantor, as directly or through any related entity

or organization, without first obtaining permission from the Court.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

Self-Employment Restriction: The defendant shall obtain prior written approval from the Court before entering into any self-employment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$400.00	**$**	**$**

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$400.00** due

immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
Southern District of Florida

Case Number: 04-60090-Cr-COOKE

UNITED STATES OF AMERICA

v.

DEVON TOEPFER

District Court's Sentencing Ruling
(Excerpt from Transcript of April 19, 2006 Sentencing Hearing)

[DEFENSE COUNSEL]: . . . When we started this trial, we had a situation where we agreed, because the plea didn't go through, that the jury was going to make the factual determinations as to the amount of plants, a la *Apprendi* and those line of cases.

THE COURT: I think everybody knows, whoever has had this issue before me, that if a defendant pleads guilty and leaves it up to the Court to make the determination as to the amount of plants, et cetera involved, then I don't think you have issues.

I think you do have issues, particularly in these cases where we have these very specific verdict forms, which we had in this case, of trying to go outside of that range as is calculated. Now, there is also the school of thought that that jury verdict form is only for statutory purposes and does not affect guideline range discussions. * * * [Sent. Tr. at 4.]

THE COURT: I find that the base offense level as contained in the PSI is correctly computed. I believe that it took into account the specific jury verdict in this case, as well as – let me back up a little bit.

I do not believe – I do not believe the base offense level of 22 is correct in this case. I don't believe it takes into account the entire substantive, as well as the conspiracy conduct. * * * [Sent. Tr. at 22.]

Supreme Court, U.S.
FILED
DEC 10 2008
OFFICE OF THE CLERK

No. 08-469

In the Supreme Court of the United States

DEVON HOWARD TOEPFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
Counsel of Record
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QUESTIONS PRESENTED

1. Whether the district court violated petitioner's Fifth and Sixth Amendment rights when, in determining his sentence, it relied on relevant conduct that underlay counts on which he had been acquitted.

2. Whether the district court committed reversible plain error because it failed to consider the factors under 18 U.S.C. 3553(a) before imposing sentence.

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In the Supreme Court of the United States

No. 08-469

DEVON HOWARD TOEPFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2008. The petition for a writ of certiorari was filed on October 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of several crimes arising from his involvement in a conspiracy to grow and distribute marijuana. Pet. App. 2a, 14a-15a. He was sentenced to 140 months

of imprisonment. *Id.* at 16a. The court of appeals affirmed. *Id.* at 1a-13a.

1. From 1994 to 2003, petitioner and several co-conspirators operated ten marijuana "grow houses" across southern Florida. Petitioner funded and oversaw the operation, recruited individuals to the conspiracy, and taught them how to grow marijuana. Presentence Report ¶¶ 4-15, 21, 22 (PSR). After a grand jury began to investigate the conspiracy, petitioner also gave diazepam (Valium) pills to two co-conspirators who had been called to testify so that they could take the pills before testifying. *Id.* ¶ 15.

On March 29, 2005, a grand jury returned a 15-count superseding indictment against several of the conspirators. Petitioner was charged with the following: conspiring to manufacture and possess with intent to distribute marijuana, in violation of 21 U.S.C. 846 (Count 1); manufacturing and possessing with intent to distribute marijuana, in violation of 21 U.S.C. 841 (Counts 2 and 4); attempting to distribute marijuana, in violation of 21 U.S.C. 841 (Count 3); possessing with intent to distribute marijuana, in violation of 21 U.S.C. 841 (Count 5); tampering with witnesses, in violation of 18 U.S.C. 1512 (Count 8); distributing diazepam, in violation of 21 U.S.C. 841 (Counts 9 and 10); conspiring to launder money, in violation of 18 U.S.C. 1956 (Count 11); and making material false statements to a lending institution, in violation of 18 U.S.C. 1014 (Counts 14 and 15). The government also alleged that Counts 1 and 2 involved at least 1000 marijuana plants, which, if proved, would have mandated a 10-year minimum term of imprisonment. 21 U.S.C. 841(b)(1)(A)(vii).

Petitioner went to trial on all counts. On the morning of the first day of trial and immediately before

swearing in the jury, the district court told petitioner that "I did want to let you know the lay of the land before we proceed." 12/5/05 Tr. 3.[1] The court then informed petitioner of the sentencing ramifications if the jury were to find that he was responsible for at least 1000 marijuana plants under Counts 1 or 2: the court would have "no discretion" as to the sentence, petitioner would be sentenced to at least ten years of imprisonment, and the court "would be bound to any finding that the jury makes." *Ibid.* Petitioner said he understood those consequences. *Ibid.*

A 14-day trial ensued, at the end of which the jury found petitioner guilty on four counts: conspiring to manufacture and possess with intent to distribute marijuana, in violation of 21 U.S.C. 846 (Count 1); manufacturing and possessing with intent to distribute marijuana, in violation of 21 U.S.C. 841 (Count 2); and distributing diazepam, in violation of 21 U.S.C. 841 (Counts 9 and 10). Pet. App. 14a-15a. The jury also found that Counts 1 and 2 had involved more than 100 but fewer than 1000 marijuana plants. *Id.* at 8a. The jury acquitted petitioner on the remaining counts. *Id.* at 15a.

Petitioner faced a statutory maximum term of imprisonment of 40 years each on the two marijuana convictions, 21 U.S.C. 841(b)(1)(B), and three years each on the two diazepam convictions, 21 U.S.C. 841(b)(2). The Presentence Report recommended that petitioner be sentenced to a term of 121 to 151 months of imprisonment. PSR ¶ 72. That recommendation was based, in part, on the PSR's finding by a preponderance of the evidence that petitioner was responsible for 3744 mari-

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[1] The record contains two transcripts of the December 5, 2005 proceedings, each with different pagination. The cited material is from the transcript filed as Dist. Ct. Docket Entry 394.

juana plants. *Id.* ¶ 22; PSR Add. 1-2. That finding resulted in a base-offense level of 26. PSR ¶ 32.[2]

At sentencing, petitioner objected to the PSR because it had considered acquitted conduct in determining his advisory Sentencing Guidelines range. In his view, that was inconsistent with *United States* v. *Booker*, 543 U.S. 220 (2005). 4/19/06 Tr. 6, 19, 30-31. The government disagreed, cited Eleventh Circuit authority indicating the court's responsibility to consider relevant conduct, and emphasized that the court should "consider the statutory factors within 18 U.S.C. 3553(a), the ten different factors I am sure the Court is familiar with." *Id.* at 15-16. The court rejected petitioner's objection, accepted the PSR's computation, and, after stating that it had considered the "pre-sentence report which contains the advisory guidelines and the statutory factors," sentenced petitioner within the Guidelines range to 140 months of imprisonment. *Id.* at 31-32. Petitioner made no objections to the court's sentencing procedures. *Id.* at 33.

2. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-13a. As is relevant here, the court rejected petitioner's claim that the district court violated his Fifth and Sixth Amendment rights by considering acquitted conduct at sentencing. The court of appeals held that "[b]ecause the district court applied the guidelines in an advisory manner * * * and did not exceed the statutory maximum allowed by the jury verdict, the [sentencing] court did not violate [petitioner's] Fifth or Sixth Amendment rights

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[2] According to the PSR, the jury held petitioner responsible beyond a reasonable doubt for 661 marijuana plants. PSR ¶ 22. Had the PSR based its recommendation on that figure, petitioner's base-offense level would have been 22.

by calculating his sentence based on judge-found facts, including acquitted conduct." Pet. App. 7a (citing *Rita* v. *United States*, 127 S. Ct. 2456, 2465-2466 (2007); *Booker*, 543 U.S. at 264; *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005)). The court also rejected petitioner's claim, raised for the first time on appeal, that the district court failed to consider the sentencing factors in 18 U.S.C. 3553(a). Applying plain-error review, the court assumed plain error but held that petitioner "cannot show that the error affected his substantial rights" because he "points to no evidence in the record showing that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence." Pet. App. 9a-10a.

ARGUMENT

1. Petitioner renews his claim (Pet. 7-15) that the district court violated his Fifth and Sixth Amendment rights by considering acquitted conduct at sentencing. The court of appeals correctly rejected that contention, and its decision accords with the decision of every other court of appeals. This Court's review is therefore not warranted.

a. In *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. The Court noted that, "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" *id.* at 152 (citation omitted), and that "[t]he

Guidelines did not alter this aspect of the sentencing court's discretion," *ibid.*

Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing without offending the Constitution. See *Watts*, 519 U.S. at 157. That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory guidelines put into place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Contrary to petitioner's contentions (Pet. 10-13), this Court's decisions in *Booker* and subsequent cases confirm that there is no constitutional infirmity in a judge basing the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury. That is true whether the conduct was not charged at all or whether it formed the basis of charges on which the jury did not find the defendant guilty.

Booker and cases elaborating on that decision make clear that, under the advisory Guidelines regime currently in place, judicial fact-finding to impose a sentence within the statutory maximum set forth in the United States Code does not violate the Sixth Amendment. As the Court explained in *Booker*:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. * * * For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.

543 U.S. at 233 (citations omitted). This Court reaffirmed in *Cunningham* v. *California*, 549 U.S. 270

(2007), that "there was no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 285. And, in the Court's recent decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Id.* at 2465-2466; see *id.* at 2467 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding") (quoting *Booker*, 543 U.S. at 233).

In discussing the type of information that the sentencing court could consider under an advisory Guidelines regime, *Booker* made no distinction between acquitted conduct and other relevant conduct. See, *e.g.*, 543 U.S. at 252 (emphasizing the need to consider all relevant conduct to achieve "the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways"). To the contrary, after emphasizing the judge's "broad discretion in imposing sentence within a statutory range," *id.* at 233, *Booker* cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found *unproved* (beyond a reasonable doubt)," *id.* at 251.

Consistent with those principles, the district court was allowed to find petitioner accountable for 3744 marijuana plants and to sentence him in accordance with that finding to 140 months of imprisonment, which is well within petitioner's 40-year statutory maximum term of

imprisonment. The court was not precluded from doing so by the jury's finding that the government had not proved beyond a reasonable doubt that the conspiracy involved 1000 or more marijuana plants. See p. 3, *supra*. That finding in no way prevents the sentencing court from determining that petitioner's accountability for 1000 or more marijuana plants was established by the preponderance of the evidence. The preponderance standard is a lower threshold of proof, and it is entirely consistent for the judge to find that threshold satisfied even if the jury found that the proof falls short of eliminating reasonable doubt. *Watts*, 519 U.S. at 156. The jury's finding on drug quantity does not prevent the district court from reaching its conclusions at sentencing. And it would be incongruous to deny a district court the ability to rely on its findings when the court would be free to make the same findings if drug quantity had never been charged at all.

b. This Court's review is particularly unwarranted because, as petitioner acknowledges (Pet. 9), there is no conflict among the circuit courts on this issue. Since *Booker*, every court of appeals with criminal jurisdiction has held that a district court may consider acquitted conduct at sentencing. See *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 128 S. Ct. 2460 (2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409, 409-411 (4th Cir. 2007), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007);[3] *United States* v. *Hurn*, 496 F.3d 784,

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[3] After *Mendez*, the Sixth Circuit issued an opinion adhering to that ruling but suggested that the defendant petition for rehearing en banc on the question whether the use of acquitted conduct at sentencing violates *Booker*. *United States* v. *White*, 503 F.3d 487, 487 (2007). On November 30, 2007, the Sixth Circuit withdrew the panel opinion in

788 (7th Cir. 2007), cert. denied, 128 S. Ct. 1737 (2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, 128 S. Ct. 1736 (2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005). This Court has also repeatedly denied petitions for a writ of certiorari raising this issue,[4] including after its recent decisions in *Rita*, *supra*, and *Gall* v. *United*

White and granted rehearing en banc. See *ibid.* Because the panel decision in *Mendez* remains in effect, however, there is no current conflict in the lower courts, and this Court's review is not warranted.

[4] See, *e.g.*, *Edwards* v. *United States*, 127 S. Ct. 1815 (2007) (No. 06-8430); *Dorcely* v. *United States*, 127 S. Ct. 691 (2006) (No. 06-547); *Armstrong* v. *United States*, 549 U.S. 819 (2006) (No. 05-1548); *Lynch* v. *United States*, 549 U.S. 836 (2006) (No. 05-10945); *Magluta* v. *United States*, 548 U.S. 903 (2006) (No. 05-952).

States, 128 S. Ct. 586 (2007).[5] There is no reason for a different result in this case.[6]

2. Petitioner also seeks review (Pet. 16-23) of the court of appeals's application of plain-error review to the district court's failure to consider the sentencing factors under 18 U.S.C. 3553(a). Review of that claim is unwarranted.

a. The court of appeals held that the district court's alleged error did not affect petitioner's "substantial rights" — and therefore was not reversible — because petitioner could "point[] to no evidence in the record showing that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence." Pet. App. 10a. As an initial matter, that holding does not warrant review because the district court did not fail to consider the Section 3553(a) factors. The parties' arguments focused on various

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[5] See, *e.g.*, *Morris* v. *United States*, 128 S. Ct. 2502 (2008) (No. 07-1094); *Douglas* v. *United States*, 128 S. Ct. 1875 (2008) (No. 07-8765); *Hurn* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-605); *Mercado* v. *United States*, 128 S. Ct. 1736 (2008) (No. 07-5810); *Smith* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7432); *Wemmering* v. *United States*, 128 S. Ct. 1737 (2008) (No. 07-7739); *Ashworth* v. *United States*, 128 S. Ct. 1738 (2008) (No. 07-8076); *Freeman* v. *United States*, 128 S. Ct. 1750 (2008) (No. 07-9368).

[6] Petitioner, relying on this Court's decision in *Smith* v. *Massachusetts*, 543 U.S. 462 (2005), also argues that the district court violated his Fifth Amendment due process rights when it imposed the 140-month sentence despite petitioner's "reliance on the trial court's plea-related advice." Pet. 13. *Smith*, however, spoke only to the Fifth Amendment's Double Jeopardy clause and thus does not bear on this case.

Petitioner also incorrectly states (Pet. 12 n.8) that the court of appeals's decision requires sentencing courts to account for acquitted conduct that is proved by a preponderance of the evidence. That issue is not raised in this case. The court plainly held only that the district court did not err by relying on acquitted conduct. Pet. App. 7a-8a.

guidelines enhancements and the consideration of acquitted conduct, but in the course of that discussion, the government stated that Eleventh Circuit authority required the court to consider the factors in 18 U.S.C. 3553(a), with which, the government was sure, the court was "familiar." 4/19/06 Tr. 15-16. And, before announcing its sentence, the court explained that it had considered the presentence report, which contained the advisory guidelines calculations as well as material bearing on the "statutory factors," and determined to impose a Guidelines sentence. *Id.* at 31-32.

The courts of appeals are unanimous that a district court need not specifically advert to the Section 3553(a) factors or run through them by rote, in checklist fashion. See, *e.g.*, *United States* v. *Johnson*, 534 F.3d 690, 695 (7th Cir. 2008) (noting that "a district court judge need not apply all § 3553(a) factors in a systematic or checklist fashion") (internal quotation marks and citation omitted); *United States* v. *Kirchhof*, 505 F.3d 409, 413 (6th Cir. 2007) ("If the record demonstrates that the sentencing court addressed the relevant factors in reaching its conclusion, the court need not explicitly consider each of the § 3553(a) factors or engage in a rote listing or some other ritualistic incantation of the factors."); *United States* v. *Smith*, 440 F.3d 704, 707 (5th Cir. 2006) ("[A] checklist recitation of the section 3553(a) factors is neither necessary nor sufficient for a sentence to be reasonable."). Here, while the district court did not specifically enumerate the application of the Section 3553(a) factors, the court was plainly aware of them. It heard the parties' arguments in the course of the sentencing (none of which specifically referred to the Section 3553(a) factors, other than the comment by the government noted above), and it imposed a sentence within

the Guidelines range. That consideration of the Section 3553(a) factors was sufficient. As in *Rita*, the court "must have believed that there was not much more to say." 127 S. Ct. at 2469. While the court "might have said more," where, as here, the context and record make clear that the court must have thought that the Guidelines sentence was appropriate in this "conceptually simple" case, *ibid.*, no more is required. Because the court did not err, petitioner would not be entitled to relief under any view of the plain-error doctrine.

On the issue of plain error, petitioner contends (Pet. 16-23) that the courts of appeals disagree on whether a district court's failure to treat the Sentencing Guidelines as advisory is reversible plain error absent a showing that the district court would have imposed a different sentence but for that error. See Pet. 19 & n.12. That question has no bearing on petitioner's case, see Pet. App. 7a (noting that "the district court applied the guidelines in an advisory manner"), and therefore does not justify this Court's review.

In any event, review of that question is not warranted because it is of rapidly diminishing importance, as the transitional cases to which it applies have virtually all been resolved. In the wake of *Booker*, the courts of appeals have adopted varying approaches to reviewing unpreserved claims of *Booker* error. This Court, however, has repeatedly declined to resolve the circuit conflict on the issue of the proper application of the plain-error test to *Booker* error. See, *e.g.*, *Rodriguez* v. *United States*, 545 U.S. 1127 (2005) (No. 04-1148). There is no reason for a different result here.

b. Petitioner suggests (Pet. 22-23) that the court of appeals's holding conflicts with this Court's decision in

United States v. *Dominguez Benitez*, 542 U.S. 74 (2004). That is incorrect.

In *Dominguez Benitez*, the Court stated that a defendant may show that an unpreserved error affected his "substantial rights" only if he can "show a reasonable probability that, but for the error," the outcome of his proceeding would have been different. 542 U.S. at 83. The court of appeals followed that reasoning when it held, based on the sentencing record, that there was *no probability* that the district court would have imposed a different sentence but for its alleged failure to consider the 18 U.S.C. 3553(a) factors. See Pet. App. 10a ("[Petitioner] points to *no evidence* in the record that if the district court had explicitly considered the § 3553(a) factors, the court would have imposed a different sentence.") (emphasis added). Moreover, the court of appeals, in its plain-error discussion, relied on its earlier decision in *United States* v. *Rodriguez*, 398 F.3d 1291 (11th Cir.), cert. denied, 545 U.S. 1127 (2005). See Pet. App. 9a. *Rodriguez*, in turn, relied on *Dominguez Benitez* in holding that the "standard for showing [an error affecting substantial rights] is the familiar reasonable probability of a different result formulation, which means a probability 'sufficient to undermine confidence in the outcome.'" 398 F.3d at 1299 (quoting *Dominguez Benitez*, 542 U.S. at 83). Accordingly, there is no merit to petitioner's suggestion that the decision below conflicts with *Dominguez Benitez*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
J. CAM BARKER
Attorney

DECEMBER 2008

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(3)

Supreme Court, U.S.
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No. 08-469

In the Supreme Court of the United States

DEVON HOWARD TOEPFER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government opposes the petition, contending that the guideline sentencing process properly bars a defendant's reliance on an acquittal. The government also argues that the circuit conflict as to plain error review in the post-*Booker*[1] sentencing context remains transitional nearly four years after it first appeared and that a violation of the statutory mandate to consider more than just the guideline range in imposing sentence does not affect substantial rights absent case-specific evidence showing that procedural compliance would lead to a lower sentence.

Contrary to the government, federal sentencing courts' reliance on acquitted conduct raises questions of fundamental importance that the Court should address. Similarly, resolving the circuit conflict as to review of plain sentencing error is crucial to appellate scrutiny of discretionary guideline sentencing.

I. THE COURT SHOULD RESOLVE WHETHER THE FIFTH AND SIXTH AMENDMENTS LIMIT GUIDELINE SENTENCING BASED ON ACQUITTED CONDUCT.

The government's brief suggests that the district court's representations to petitioner–as part of a plea-related colloquy–that the jury's special verdict sentencing findings would *bind* the court at sentencing can be interpreted as bearing only on the mandatory minimum of the statutory sentencing range and not the federal sentencing guideline range. BIO 3

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[1] *United States v. Booker*, 543 U.S. 220 (2005).

(conceding district court's pretrial assurance to petitioner that at sentencing it "would have '*no discretion*' as to the sentence, petitioner would be sentenced to at least ten years of imprisonment, and the court 'would be bound to *any* finding that the jury makes'") (quoting 12/5/05 Tr. 3) (emphasis added).[2] More generally, the government disputes whether the Due Process Clause is implicated where a defendant mistakenly relies on a district court's representation that it will be bound by a jury's special verdict findings.

The government also notes that there is no apparent circuit conflict concerning guideline use of acquitted conduct and that language in the Court's post-*Apprendi*[3] guideline decisions supports the use of acquitted conduct on the theory that the defendant's constitutional rights are affected only if the statutory maximum is raised. BIO 7-9.

Despite the government's opposition, there are strong bases for the Court's review. The case against review of the acquitted conduct dilemma rests on a triad of false premises: that defendants have no constitutional basis for reliance on the jury trial process as a means of testing their claims of innocence or partial innocence, even where reliance is heightened, as in petitioner's case, by the district court's specific pretrial representation that the jury

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[2] The district court adopted the presentence report setting a lower mandatory minimum level based on the jury's finding of less than 1000 marijuana plants in the marijuana conspiracy, but ignored the jury's findings for purposes of setting the guidelines that drove the sentence.

[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

verdict and findings will have a binding effect at sentencing; that under the court of appeals' decision, district courts arguably are free to either ignore acquitted conduct in calculating the guidelines or vary from the guideline range so as to eliminate the guideline effect of such conduct; and that routine use of acquitted conduct to set criminal punishment does not erode the constitutional design for, and the public's confidence in, the judicial system and the relevance of the role of the jury. *See* BIO 6 ("[T]here is no constitutional infirmity in a judge basing the defendant's sentence, within the statutory maximum, on conduct that was not found by the jury."); *id.* at 8 (arguing that deference to jury verdicts in guideline context is "incongruous" given that uncharged conduct can be considered in sentencing).

1. Regarding the due process question raised by guideline use of acquitted conduct despite a defendant's reliance on contrary trial court representations, the government proposes a reading of the record that goes beyond that of the court of appeals, which concluded merely, as an alternative ground for affirmance, that the record did not establish a valid "agreement" by the parties to rely solely on the jury verdict as the basis for sentencing. Pet. App. 6a-7a; *id.* at 7a (citing circuit authority precluding binding effect of parties' plea-based guideline calculation agreement).

Regardless of whether there was a meeting of the minds about the meaning of the district court's representations (and warnings) to petitioner, there is a substantial basis to conclude that petitioner went to trial in reliance on express assurances of the binding effect of the jury's special verdict, as the uncontested

statement by defense counsel at sentencing shows. *See* 4/19/06 Tr. 4 (citing trial court's pretrial warning to petitioner that "because th plea didn't go through, ... the jury was going to make the factual determinations as to the amount of plants"). Nothing in the decision of the court of appeals contradicts petitioner's actual reliance on the district court's representation. Instead, the clear thrust of the court of appeals' decision is that the guideline system renders such reliance unenforceable. Pet. App. 7a.

Notably, the government ignores that the trial prosecutor also proceeded at trial in reliance on the same understanding of the district court's representation, as seen in the government's request for special jury verdict findings on specific amounts of drugs for the determination of elevated guideline levels. *See* 12/16/05 Tr. 64.[4]

Nor is there a principled basis for the distinction the government seeks to draw between the binding effect of a special verdict on the guideline range and a similar effect of the verdict on the statutory minimum, in that, as the Court explained in *Harris v. United States*, 536 U.S. 545 (2002), there is no jury trial right to determination of facts implicating a mandatory minimum. Presuming that a defendant will parse out a legally-mistaken distinction between the statutory minimum and the top of the guideline range is unwarranted, and, in fact, as the special verdict requests by the trial prosecutor show, not even the

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[4] Not only did the jury make specific findings rejecting government allegations of a higher quantity of marijuana, it also acquitted petitioner of three of the four substantive counts of marijuana growing.

government thought the district court's representation as to the binding effect of the jury findings was limited to the mandatory minimum.

The government gives short shrift to the due process implications of a defendant's reliance on a jury's verdict and special findings, noting merely that *Smith v. Massachusetts*, 543 U.S. 462 (2005), was decided under the Double Jeopardy Clause. BIO 10 n. 6. The Court explained in *Smith* that trial strategies are based on district court rulings as to what is or is not being tried in the case and that substantial prejudice can result from such reliance if the trial court is permitted to later revisit the question and change its mind. Although the Court did not hold that such prejudice amounts to a due process violation, *see* 543 U.S. at 473 n. 7 (relying on the Double Jeopardy Clause, but disputing "the dissent's due-process analysis"), the reliance or fair warning concept is plainly part of due process, just as the opinions of circuit judges questioning the use of acquitted conduct explain that the upsetting of expectations about the respect owed a verdict impacts not merely the defendant, but society at large, and is a principal adverse consequence of unrestrained use of acquitted conduct to punish criminal defendants.[5]

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[5] Due process concerns were also noted by the Court in *United States v. Watts*, 519 U.S. 148 (1997). *See, e.g., United States v. Hurn*, 496 F.3d 784, 788-89 (7th Cir. 2007) (circuit conflict cited in *Watts*, as to whether preponderance burden is too low where sentence is based almost entirely on acquitted conduct, persists). That petitioner's reliance arose in the context of plea discussions is notable given that the

(continued...)

2. Conceding that the Court has not addressed the role of acquitted conduct in guideline sentencing since its pre-*Apprendi* holding, in *United States v. Watts*, 519 U.S. 148 (1997), that double jeopardy does not bar such use, the government does not address mounting evidence of the erosion of both the constitutional process for criminal adjudication and the societal understanding of the role of the people–as jurors–in that process. Taking instead the approach of noting that no circuit has reversed a sentence based on acquitted conduct, the government does not address the merits of the analyses of dissenting circuit judges.[6]

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[5] (...continued)
constitutional validity of the plea bargaining balance is premised on the parties' relatively equivalent leverage due to a defendant's trial rights. *See Bordenkircher v. Hayes*, 434 U.S. 357, 362-63 (1978). With acquitted conduct sentencing, if a jury trial settles nothing about crucial sentencing disputes, any trial-right leverage is reduced, increasing the pressure on defendants to reach a plea agreement that sets guideline limits. The resulting scheme ironically allows "real offense sentencing" to undermine a principal goal of the Sentencing Reform Act: to reduce disparity by mitigating distorting effects of plea bargaining.

[6] *See, e.g., United States v. Canania*, 532 F.3d 764, 776 (8th Cir. 2008) (Bright, J., concurring); *United States v. Grier*, 475 F.3d 556, 586 n. 34 (3d Cir. 2007) (Ambro, J., concurring); *United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (B. Fletcher, J., dissenting); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring); *United States v. Henry*, 472 F.3d 910, 920 (D.C. Cir. 2007) (Kavanaugh, J., concurring).

The government also does not address the concerns raised by the District of Columbia Circuit, in *United States v. Settles*, 530 F.3d 920, 923-24 (D.C. Cir. 2008), that "defendants find it unfair for district courts to rely on acquitted conduct when imposing a sentence" and "that defendants find it unfair even when acquitted conduct is used only to calculate an advisory Guidelines range because most district judges still give significant weight to the advisory Guidelines when imposing a sentence."[7] *See United States v. Turner*, No. 07-3107, __ F.3d __, 2008 WL 5101309 (D.C. Cir. Dec. 5, 2008) ("[I]ndeed, the actual impact of *Booker* on sentencing has been minor."). The detachment of theory from reality noted in *Settles* is of course more pronounced in cases where special verdict findings are employed and where parties are incorrectly given to understand that the jury findings will be binding, but it is present at some level in nearly every acquitted conduct case. *Canania*, 532 F.3d at 777 (Bright, J., concurring) ("[T]he use of 'acquitted conduct' to enhance a sentence violates the Due Process Clause of the Fifth Amendment. ... [T]he consideration of

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[7] In the first year following *Booker*, 98.6% of within-guideline sentences appealed were affirmed, and 78.3% of below-guideline sentences were reversed. See Court of Appeals Review 12/1/05-11/30/06 at 2, available at www.fd.org/CourtofAppealsReview12.1.05-11.30.06.pdf. In the first quarter of 2007, 11.9% of sentences were non-government-sponsored below guideline sentences, and 86.7% were within-guideline or government-sponsored below-guideline sentences. U.S. Sentencing Commission, Preliminary Quarterly Data Report, http://www.ussc.gov/sc_cases/Quarter_Report_4th_07.pdf.

'acquitted conduct' undermines the notice requirement that is at the heart of any criminal proceeding.").

The government does not address the District of Columbia Circuit's divergence in *Settles* from the Eleventh Circuit's holding in petitioner's case. *Settles*, 530 F.3d at 924 (concluding that "even though district judges are not required to discount acquitted conduct, the *Booker-Rita-Kimbrough-Gall* line of cases may allow district judges to discount acquitted conduct in particular cases–that is, to vary downward from the advisory Guidelines range when the district judges do not find the use of acquitted conduct appropriate"); BIO 10 n. 6 (claiming that petitioner misreads the Eleventh Circuit's decision when he asserts that the court of appeals' use of the term "obligation" to count acquitted conduct indicates that counting such conduct for guideline purposes is mandatory). But the decision of the court of appeals makes it clear that the Eleventh Circuit deems rejection of the guideline level based on an opposition to the use of acquitted conduct impermissible even where the parties agree to such a calculation and treats as closed the issue of guideline use of acquitted conduct.[8]

Nor does the government recognize the

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[8] Given statutory ambiguity regarding use of acquitted conduct, *see* 18 U.S.C. § 3553(a)(1), (2), (6), 28 U.S.C. §§ 991(b)(1)(B), 994(c)(2), (3), there can be no presumption that Congress required such use in guideline calculations. The avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

significance of the still-unresolved *en banc* proceedings in the Third Circuit which, for more than a year, has had under consideration the question of whether acquitted conduct may be used to set guideline sentences. *United States v. White*, 503 F.3d 487 (6th Cir. 2007) (rehearing *en banc* granted Nov. 30, 2007). The persistence of the issue is undoubtedly based on "the jury's central role in the criminal justice system," *Canania*, 532 F.3d at 776 (Bright, J., concurring), and the damage to the constitutional structure caused by a derogation of the jury's verdict, a judgment the jury is told is meant to speak the truth. This case presents the Court with an ideal opportunity to explain the limits of sentencing consideration of acquitted conduct.

II. THE COURT SHOULD RESOLVE THE CONFLICT AS TO PLAIN ERROR REVIEW OF SENTENCING ERRORS.

In opposing resolution of the long-standing circuit conflict in the application of the substantial-rights prong of plain error review in sentencing appeals, the government claims that the district court gave some consideration to statutory factors, even though the court of appeals assumed that it did not, BIO 10; admits a circuit conflict on the issue, but argues that the conflict is still transitional, BIO 12; and disputes any tension between the court of appeals' decision and *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 (2004), because the court of appeals found no record evidence indicating a probability of a different result absent the error. BIO 13.

1. The government claims that the district court's reference to the presentence report (PSR) and

mention the "statutory factors" addressed in the PSR implies that the district court complied with the obligation to base its sentence on statutory factors going beyond the guidelines, under 18 U.S.C. § 3553(a). BIO 11 ("[B]efore announcing its sentence, the court explained that it had considered the presentence report, which contained the advisory guidelines calculations as well as material bearing on the "statutory factors ... ."). But the court of appeals did not accept that claim, and the district court's rote reference to the PSR, a document prepared principally to set the guideline range, did not meet the essential statutory requirement to consider all relevant factors without singular reliance on the guidelines. Notably, under Fed. R. Crim. P. 32(d), a PSR addresses guideline calculations and departure grounds, but need not give notice of variance issues. *See Irizarry v. United States*, 128 S.Ct. 2198 (2008). Petitioner's PSR, following the direction of Rule 32(d), neither addressed the statutory factors nor acknowledged the possibility of a variance. The record leaves little doubt that the contested issues regarding the use of acquitted conduct at petitioner's sentencing hearing completely subsumed all other discussion and considerations. The court of appeals correctly reached the merits of the plain error claim.

2. The government seeks to distinguish two types of *Booker* error: treatment of the guidelines as mandatory and failure to consider statutory factors other than the guidelines. BIO 12. However, this distinction is more formal than real, for in failing to consider non-guideline factors, the district court effectively eliminates any basis for imposing a non-guideline-based sentence. And the government's

suggestion that such erroneous guideline-deferential sentencing is merely a transitional phenomenon is unfounded, particularly in light of sentencing statistics showing the dominant role of the guidelines. *See* note 7, *supra*.

Nor does the question presented–whether "a defendant, in order to show the harmfulness of the violation of forfeited procedural rights at sentencing, must present evidence that the sentence would have been lower but for the violation"–turn on the precise form of *Booker* error committed by the district court, but rather on the importance of procedural compliance in order to ensure that the *Booker* promise of advisory guidelines can be realized in sentencing dispositions.

3. The government claims that the Court's plain error analysis in *Dominguez-Benitez*, 542 U.S. at 81 (substantial rights affected only where there is a "reasonable probability" of effect on outcome), is indistinguishable from the court of appeals' standard that requires presentation of evidence that the district court would have imposed a lower sentence, but for the court's failure to consider non-guideline factors. See Pet. App. 10a (holding that "neglecting to consider the § 3553(a) factors" does not affect substantial rights absent record evidence pointing to lower sentence).

The government does not address the critical preponderance-of-the-evidence component of the Eleventh Circuit's interpretation of the "reasonable probability" standard, as first set forth in *United States v. Rodriguez*, 398 F.3d 1291, 1301 (11th Cir. 2005), and applied in petitioner's case. Under *Rodriguez*, there can be no such reasonable probability if "[t]he record provides no reason to believe any result is more likely than the other," or if "the effect of an error on the

result in the district court is uncertain or indeterminate." *Id.* This preponderance component–which virtually immunizes from review procedural error, no matter how fundamental–directly conflicts with the decisions of other circuits and merits the Court's review.

Particularly in light of the Eleventh Circuit's extension of the *Rodriguez* prejudice rule from "plain *Booker* error" to other sentencing contexts, the Court should address application of *Dominguez-Benitez* and resolve the meaning of a "reasonable probability" of a different result in sentencing proceedings.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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